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No. 56575-7-II

THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRADLEY J. CURTIS,

Appellant.

Appeal from the Superior Court of Washington
for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
Office ID 91182
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

- A. Was there insufficient evidence to support the trial court's finding that Curtis was guilty of Unlawful Possession of a Firearm in the Second Degree?
- B. Did Curtis receive effective assistance from his trial counsel?
- C. The State concedes the 100-dollar DNA fee was improperly imposed and must be waived.
- D. Curtis waived any issue with the notice of income-withholding action section of his judgment and sentence by failing to raise it first in the trial court.

II. STATEMENT OF THE CASE

In June 2021, a search warrant was served on Curtis' home in Winlock, Washington. CP 76 (FF 1.3).¹ The search warrant was obtained after deputies served a protection order on Curtis. CP 4. The deputies had been informed by the petitioner, Curtis' wife, that Curtis possessed "a shotgun in the closet off the laundry room."

During the search of the residence, the deputy found a .410 caliber Rossi shotgun located in the closet by the

¹ The State will cite the Finding of Fact as FF.

laundry room. *Id.* The deputy also searched Curtis' bedroom. DP 76 (FF 1.4.) Inside the bedroom, the deputy found a rifle inside of a locked black case. *Id.* The rifle did not have a serial number. *Id.*

The deputy continued to search Curtis' home and outbuilding. CP 76 (FF 1.5-1.7). The deputy found gun parts and ammunition. CP 76 (FF1.5). The deputy located an invoice for rifle parts. CP 76 (1.6). Finally, inside an outbuilding, the deputy located machining tools and gun parts used for manufacturing gun parts that could be assembled into a working rifle. CP 76 (FF 1.7).

Based upon the above information, and Curtis having previously been convicted of Indecent Liberties in 2011, the State charged Curtis with two counts of Unlawful Possession of a Firearm in the Second Degree. CP 1-3. Curtis' attorney filed a motion to suppress the evidence for lack of probable cause. CP 6-16. Curtis' attorney raised an additional issue and further briefing was submitted. CP 17-

42. The trial court heard the motion and denied the warrant challenge. RP 4-35;² CP 43-47.

Curtis decided to forgo a jury trial and have his case tried to the bench on stipulated fact. RP 38-43; CP 75-77. The trial court found Curtis guilty. CP 77. The trial court sentenced Curtis to six months in jail, allowing for electronic home monitoring. CP 52-53. The trial court stayed the execution of Curtis' sentence pending his appeal. CP 57-58. Curtis timely appeals. CP 62-74.

The State will supplement the facts as necessary throughout its argument below.

² The State is citing to the continually paginated verbatim report of proceedings containing the 9/22/21 motion hearing, 11/9/21 stipulated facts trial, and the 12/22/21 sentencing hearing as RP.

III. ARGUMENT

A. THERE WAS SUBSTANTIAL EVIDENCE PRESENTED THAT CURTIS WAS KNOWINGLY IN POSSESSION OF THE FIREARMS.

Curtis argues the stipulated facts failed to prove he was knowingly in possession of the firearms, and further, the trial court did not make such a finding. Appellant's Opening Brief (AOB) at 7. The stipulated facts and the findings of guilt sufficiently prove and find Curtis knowingly possessed the firearms. This Court should affirm Curtis' convictions.

1. Standard Of Review.

Sufficiency of evidence following a bench trial is reviewed for "whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court's conclusions of law." *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015) (citation omitted). Unchallenged findings are verities on appeal.

State v. Lohr, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

This Court reviews mixed questions of law and fact de novo. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Alleged constitutional errors are also reviewed de novo. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482, (2013).

2. The Findings Support The Trial Court's Conclusion That Curtis Unlawfully Possessed A Firearm In The Second Degree In Counts 1 And 2.

Curtis asserts the findings do not establish Curtis knowingly possessed the firearms, and the trial court's finding of guilty do not make such a finding either. AOB at 7-16. Curtis does not assign error to any of stipulated findings; therefore, they are verities on appeal. *Lohr*, 164 Wn. App. at 418. The findings were sufficient to establish knowing possession of the firearms and the trial finding of guilty established the essential element was found.

To convict Curtis of unlawful possession of a firearm in the second degree, the State had to prove that, (1) Curtis was previously convicted of a felony; (2) the felony did not qualify under RCW 9.41.010 as a serious offense; and (3) Curtis knowingly owned or had in his possession or under his control a firearm. RCW 9.41.040(2)(a)(i); WPIC 133.02.02; CP 1-2. Curtis does not contest the first two elements.

Curtis' issue is whether there was sufficient proof of knowing possession.

A person knows or acts knowingly or with knowledge when:

(i) He or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) He or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(b). Possession can be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d

400 (1969). Actual possession means “physical custody of the item” in question. *State v. Summers*, 107 Wn. App. 373, 384, 28 P.3d 780 (2001). This matter is not one of actual possession.

When a person does not have actual possession but has dominion or control over the contraband or the premises, the person is in constructive possession of the contraband. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004) (citation omitted). A person is not required to have exclusive control for the State to establish constructive possession. *Cote*, 123 Wn. App. at 549. Yet, mere proximity is not sufficient to establish constructive possession. *Id.*

Determinations regarding dominion and control are made looking at the totality of the circumstances. *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014), citing *State v. Partin*, 88 Wn.2d 899, 906 567 P.2d 1136 (1977), *overruled on other grounds by State v. Lyons*, 174 Wn.2d

354, 275 P.3d 314 (2012). The ability to take actual possession of the contraband and exclude others from possession can be considered when determining whether a person had dominion and control over the contraband. *Davis*, 182 Wn.2d at 234. “Factors supporting dominion and control include ownership of the item and, in some circumstances, ownership of the premises. But, having dominion and control over the premises containing the item does not, by itself, prove constructive possession.” *Id.* Dominion and control does raise a rebuttable inference over the contraband found within the premises. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

Curtis acknowledges that courts have found sufficient evidence of dominion and control in cases where a person was in constructive possession of a firearm as the owner, and recent occupier, of a vehicle where the firearm was located. *State v. Bowen*, 167 Wn. App. 821, 827-28, 239 P.3d 1114 (2010); *State v. Turner*, 103 Wn. App. 515,

521-24, 13 P.3d 234 (2000). In *Bowen*, officers discovered a firearm when they searched a vehicle incident to Bowen's arrest. *Bowen*, 157 Wn. App. at 825. The *Bowen* court found there was sufficient evidence of dominion and control because Bowen was "the owner, driver, and sole occupant" of the vehicle where the firearm was located by the officers. *Id.* at 828. A person does not need to be able to exert immediate dominion and control at the precise time the firearm is discovered by police. *Id.*

Turner was also the owner and driver of the vehicle that a firearm was found in by law enforcement after Turner was arrested on other charges. *Turner*, 103 Wn. App. at 518, 521. Turner was inside the truck at the time he was contacted by law enforcement. *Id.* at 518. Regardless, there was evidence that Turner had been driving the truck, he had been in close proximity to the firearm and he knew the firearm was present even if he had not handled the

weapon. *Id.* at 521. The *Turner* court found the evidence was sufficient. *Id.* at 524.

Curtis argues the stipulated facts fail to establish he knowingly possessed the firearms. Further, Curtis asserts the trial court did not make this finding. AOB at 13. Curtis argues other than residing in the home there is no proof that he we was aware of the firearms. *Id.* Curtis further asserts because there is no evidence that Curtis was the sole occupant of the home the firearms could be the property of another individual residing in the home and the findings fail to eliminate that reasonable possibility. AOB at 13-14. Curtis' arguments fail.

Curtis ignores that dominion and control need not be exclusive. The firearm possessed by Turner, for example, was admitted to be owned by the other occupant of the vehicle. *Turner*, 103 Wn. App. at 521. Further, the *Turner* court stated, "[A] jury may infer that a defendant has constructive possession of an item when that person has

dominion and control over the premises where an item is located. Ownership and actual control of a vehicle establish dominion and control.” *Id.* at 524.

The next step is knowledge. Knowledge can be proven through direct or circumstantial evidence. “The term ‘circumstantial evidence’ refers to evidence from which based on your common sense and experience, you may reasonably infer something that is at issue in [a] case.”

WPIC 5.01. The stipulation states:

On 06-19-2021, Deputy Tyler Nichols served a search warrant on the defendant’s home located at...Inside the closet by the laundry room, the officer found a .410 caliber Rossi shotgun. This is the firearm referred to in Count 1.

CP 76 (FF 1.3). This finding states the warrant is being served at Curtis’ residence. *Id.* There is a rebuttable presumption that a person has dominion and control over their residence. Next, the item located was a .410 caliber Rossi shotgun in a closet by the laundry room. *Id.* This means this firearm had to minimally have an 18 inch barrel,

plus a stock (making it at least 26 inches in total length), sitting in a closet in Curtis' residence. See, RCW 9.41.010(33). It is reasonable to infer that Curtis had knowledge that there was a shotgun in the closet of his home. There was sufficient evidence in Finding of Fact 1.3 to prove knowledge.

Next, there is the firearm at issue in Count 2:

The deputy also found in Curtis's bedroom a locked black case that contained a rifle with no serial number, that had a SBR upper receiver, with the letters "B<P8B" stamped on the receiver. This is the firearm to in Count 2."

CP 76 (FF 1.4). The rifle was found in Curtis' closet. A person could infer from their common sense and experience that a rifle case, which is not small, found in a bedroom would be known to the person who resides in that bedroom. There was sufficient evidence in Finding of Fact 1.4 to prove knowledge.

Finally, contrary to Curtis' assertion, the Findings of Guilty do sufficiently find that Curtis knowingly possessed

the firearms in Count 1 and Count 2. CP 76-77. The

Findings of Guilty, 2.1, state,

Based on the facts contained in this stipulation,
the court finds the defendant guilty of unlawful
possession of a firearm as charged in count 1.

CP 76. The Finding of Guilty, 2.2 state,

Based on the facts contained in this stipulation,
the court finds the defendant guilty of unlawful
possession of a firearm as charged in count 2.

CP 77. These findings of guilt find Curtis guilty as charged.

The information charging Curtis for both counts of Unlawful Possession of a Firearm in the Second Degree contain all the essential elements, including knowingly possess the firearms. CP 1-3. The Findings of Guilty are sufficient. This Court should affirm the trial court and Curtis' conviction.

**B. CURTIS RECEIVED EFFECTIVE ASSISTANCE
FROM HIS ATTORNEY THROUGHOUT THE
TRIAL PROCEEDINGS.**

Curtis' attorney provided competent and effective legal counsel throughout the course of his representation. Curtis argues in the alternative that if this Court rejects

Curtis' sufficiency of evidence claim due to an interpretation that Curtis' signature on the stipulation for the stipulated facts trial waives such a claim, then Curtis received ineffective assistance of counsel. The record is clear that none of the participants, including the trial judge, viewed Curtis' signature as waiving his right to appeal the finding of guilt at his trial. Curtis' counsel was effective in his representation of his client.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) (citations omitted).

2. Curtis' Attorney Was Not Ineffective During His Representation Of Curtis Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Holmes must show (1) the attorney's performance

was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*,

116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Curtis discussed with his attorney the pros and cons of proceeding with a stipulated facts bench trial. RP 41-42. Curtis understood he had the right to a jury trial and he gave up that right. RP 41. Curtis also understood the trial court would “make a decision based solely, not on witnesses or argument or other evidence, just what is in the stipulated facts as well as the exhibit that was presented.” RP 41-42.

While the document states in its title, “Stipulated Facts & Findings of Guilt,” none of the findings of guilty state that Curtis is stipulating to being guilty. CP 75-77. The State acknowledges the signature lines could have been drafted better, as could the title of the document, but the

findings make it clear that the trial court is determining guilt based on stipulated facts. *Id.* Further, the trial court did not conduct the proceedings as though Curtis was stipulating to guilt. RP 40-42.

During Curtis' stipulated facts bench trial, the trial court reviewed the stipulation and admitted an additional exhibit. *Id.* The trial court stated, "I will make the findings as requested in the stipulation that he is guilty of unlawful possession of a firearm in the first degree as charged in count one..." RP 42. The trial court also found Curtis guilty of count 2, as charged. *Id.*

During sentencing, the trial court told Curtis, "So because this was a trial, it was a stipulated facts trial, but it was a trial. You have a right to an appeal. So it means you can appeal the verdict." RP 51. During these proceedings, Curtis was told it was a trial. Curtis was told the trial court was making a decision based upon stipulated facts, not a stipulation of guilt. Finally, the trial court clearly and

concisely stated Curtis had a right to appeal the verdict because it was a trial.

There can be no mistake; the stipulation was to the facts, notwithstanding any vagueness brought upon by the drafting choices of the document itself. Therefore, Curtis attorney was not deficient for promoting a stipulated facts trial as a possible resolution for Curtis. All of Curtis' appellate rights were preserved, he has not met the burden to show he counsel was deficient, and his claim of ineffective assistance of counsel fails.

C. THE STATE CONCEDES THE DNA FEE WAS IMPROPERLY IMPOSED.

Curtis asserts the trial court improperly ordered the 100-dollar DNA fee because Curtis is already a convicted felon due to a prior, 2011, felony conviction from Thurston County. AOB 19. The State concedes the 100-dollar fee was improperly levied.

Pursuant to RCW 43.43.7541, the imposition of the DNA-collection fee is required "unless the state has

previously collected the offender's DNA as a result of a prior conviction." As stated above, Curtis has a felony conviction in Washington State; therefore, his DNA was previously collected and is on file with the Washington State Patrol Crime Lab. The State respectfully asks this Court to remand this case to the superior court to amend the judgment and sentence to strike the imposition of the 100-dollar DNA fee.

D. CURTIS CANNOT RAISE, FOR THE FIRST TIME ON APPEAL, THE TRIAL COURT'S FAILURE TO INCLUDE A NOTATION REGARDING THAT INCOME WITHHOLDING MAY NOT BE SATISFIED BY SOCIAL SECURITY BENEFITS, AS IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.

For the first time on appeal, Curtis argues the trial court erred when the income withholding provision in the judgment and sentence did not include a notation that legal financial obligations may not be satisfied by Social Security

Benefits.³ AOB at 21-25. The issue has not been preserved for review.

1. Standard Of Review.

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. Curtis Failed To Argue Below That The Trial Court Should Include A Notation Regarding That Income Withholding May Not Be Satisfied By Social Security Benefits, Therefore, Curtis Must Demonstrate That The Error Is A Manifest Constitutional Error.

Curtis did not raise an objection to the trial court regarding the income holding provision language in his judgment and sentence. RP 47-53; CP 54. An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*,

³ An identical argument was made by the appellant in *State v. Shangin*, COA No. 82825-8-I, 21 Wn. App. 2d 1031 (Wash. Ct. App. March 21, 2022) (unpublished), cited pursuant to GR 14.1 for persuasive authority. This is the sole issue raised in *Shangin*.

167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two-part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333.

Assuming there is an error, it would be statutory, not constitutional. The claim of error is therefore not preserved for review.

An error is manifest if the appellant can show actual prejudice. *O'Hara*, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

Legal financial obligations may not be satisfied from Social Security Disability Income. *State v. Catling*, 193 Wn.2d 252, 264, 438 P.3d 1174 (2019); 42 U.S.C. § 407(a). To determine if the court erred the record would need to show Curtis received those benefits. Because there is no evidence Curtis receives such benefits, or will

receive those benefits in the future, the record is insufficient to review the claim. In fact, the record here shows Curtis was working at the time of sentencing, making approximately \$3,000 per month. RP 48-49.

Curtis does not address the procedural bar to consideration of this issue. Rather he supports his argument by relying on *Catling, supra* and *State v. Dillon*, 12 Wn. App. 2d 133, 456 P.3d 1199, *review denied*, 195 Wn.2d 1022 (2020). Neither case stands for the proposition that the issue may be reviewed here.

In *Catling* the defendant objected to imposition of legal financial obligations on the basis that his sole source of income was Social Security disability benefits. *Catling*, 193 Wn.2d at 255. The issue was therefore preserved for review.

The opinion in *Dillon* does not make clear whether the defendant objected to imposition of LFOs or not. Nor did the Court did not address issue preservation. However,

the record did show that his sole source of income was Social Security disability benefits. *Dillon*, 12 Wn. App. 2d at 153. Here because there is no similar record, review is not appropriate.

3. Remand To The Trial Court To Amend The Judgment And Sentence Is Unnecessary Under The Facts Of This Case.

If the Court reviews the issue, then it should reject Curtis' argument that remand is required. Neither *Catling* nor *Dillon* stated that the anti-attachment notice was a requirement for a legally valid judgment and sentence.

In *Catling* the Court of Appeals remanded the case to the sentencing court to amend the judgment and sentence to reflect that legal financial obligations could not be satisfied out of any funds "subject to 42 U.S.C. § 407(a)." *Catling*, 193 Wn.2d at 264. The State urged the Supreme Court to affirm that remedy. *Id.* The Supreme Court did so, finding it provided an appropriate balance between adhering to the federal statutory mandate, while

also recognizing that statute did not prohibit imposition of mandatory financial obligations. Id.

In *Dillon* this Court simply adopted the remedy set out in *Catling*, without further discussion. *Dillon*, 12 Wn.App.2d at 153. Neither *Catling* nor *Dillon* require the judgment and sentence to include a notation that legal financial obligations may not be satisfied from federal disability benefits pursuant to 42 U.S.C. § 407(a). Nor has the Court incorporated that notation in its proscribed forms. See eg. WPF CR 84.0400-J and WPF CR 84.0400 P.⁴

Here, where there is no evidence the defendant has or will received disability benefits pursuant to 42 U.S.C. it makes little sense to remand to the trial court to perform a useless act. Because it is not required, and would not

Curtis argues the court should remand the matter to clarify the judgment and sentence, even though the

⁴Located at <https://www.courts.wa.gov/forms/?fa=forms.contribute&formID=18> (last visited August 26, 2022).

clarification would have no effect on him personally. Curtis urges the Court not to read *Dillon* narrowly, arguing that remand in that case was not contingent on the defendant's current receipt of Social Security benefit. He relies on this Court's order to amend the judgment and sentence to indicate that the \$500 victim assessment may not be satisfied out of funds subject to 42 U.S.C. § 407(a).

The remedy in *Dillon* applied because the record showed that his sole source of income was Social Security disability benefits. *Dillon*, 12 Wn. App. 2d at 153. It has no application where the defendant is not currently receiving benefits subject to 42 U.S.C. § 407(a). Nor does it apply when the record suggests the defendant will not be receiving those benefits once released from prison. The defense did not object to a condition of community custody that he obtain and maintain employment. He would not have withheld an objection to that condition if he

anticipated receiving disability benefits because he *could not* work.

Curtis also argues that judicial economy favors remand for clarification. His argument is based on speculation that at some point in the future he may receive benefits under 42 U.S.C. §407(a). Curtis points to no authority on which a reviewing court has remanded to the trial court to perform additional actions based on mere speculation. If Curtis does begin receiving those benefits he may return to court to request an order prohibiting benefits received under that statute from satisfying his legal financial obligations. Contrary to Curtis' argument, judicial economy *disfavors* asking the trial court to do something that may very well be meaningless in the defendant's case.

IV. CONCLUSION

The stipulated facts and findings of guilty by the trial court sufficient prove and find that Curtis knowing

possessed the firearms found in his home. Curtis received effective assistance from his counsel throughout these proceedings. The State concedes the DNA fee must be stricken from the judgment and sentence. Finally, Curtis failed to preserve any issue regarding the fail to include a notation that the income withholding provision cannot be satisfied by Social Security Income. This Court should affirm Curtis' conviction and sentence, with the exception of striking the DNA fee.

This document contains 4,348 words, excluding the parts of the document exempted from the words count by RAP 18.17.

RESPECTFULLY submitted this 26th day of August, 2022.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney);



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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- nielsene@nwattorney.net

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Sender Name: Lori Jendryka-Cole - Email: lori.cole@lewiscountywa.gov

Filing on Behalf of: Sara I Beigh - Email: sara.beigh@lewiscountywa.gov (Alternate Email:)

Address:
345 W. Main Street
2nd Floor
Chehalis, WA, 98532
Phone: (360) 740-1240

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